

153 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Buckeye Pipe Line Company, L.P.

Docket No. IS16-7-000

ORDER ACCEPTING TARIFF

(Issued October 30, 2015)

1. On October 1, 2015, Buckeye Pipe Line Company, L.P. (Buckeye) filed FERC Tariff No. 440.6.0 to be effective November 1, 2015. Buckeye is seeking to institute volume incentive rates as well as change existing base rates for aviation turbine fuel. For the reasons discussed below, Buckeye's tariff is accepted, effective November 1, 2015.

Background

2. Buckeye has filed FERC Tariff No. 440.6.0 to institute volume incentive rates and to change the base rates for aviation fuel. The changes are being made pursuant to a settlement filed June 19, 2015 in Docket Nos. OR12-28, OR13-3 and OR14-41.¹ The settlement was uncontested and resolved all controversies between Buckeye and the Parties² in that proceeding. The Commission issued an order approving the settlement on September 29, 2015, and pursuant to the settlement Buckeye was required to file a new tariff within 5 business days of the order.³

3. The volume incentive rates instituted in this filing apply to all aviation fuel consumers that execute an agreement with Buckeye between October 1, 2015 through

¹ Joint Explanatory Statement Regarding Offer of Settlement and Joint Permission to Withdraw Complaints, Docket Nos. OR12-28, OR13-3, and OR14-41-000. (June 19, 2015).

² The Parties comprise American Airlines, Inc., Delta Air Lines, Inc., JetBlue Airways Corporation, United Air Lines, Inc., and US Airways, Inc.

³ *Delta Air Lines Inc. et al. v. Buckeye Pipe Line Company, L.P.*, 152 FERC ¶ 61,242 (2015)

December 30, 2015 and ship to the New York Airports.⁴ Those consumers commit to ship on their behalf (or pay a deficiency payment), a minimum of 3,300,000 barrels of aviation fuel a year for a specified number of years. In exchange, Buckeye's existing rates will be reduced by 76 percent to Newark Airport (Newark), 44 percent to John F. Kennedy International Airport (JFK) and 16 percent to LaGuardia Airport (LaGuardia).

4. In addition to the volume incentive rate program, this filing also adjusts the base rates to the New York Airports. The new base rates reflect a 40 percent reduction from current rate levels to Newark, a 20 percent reduction to JFK, and a 4.6 percent increase to LaGuardia.

Interventions and Protests

5. A joint motion to intervene and protest was filed by World Fuel Services, Inc., Virgin America Inc., Virgin Atlantic Airways Limited, and Alaska Airlines Inc. (hereafter, Protesters). The Commission grants all unopposed motions to intervene filed before the issuance date of this order. The Protesters assert they have standing to protest because they have a substantial economic interest in Buckeye's proposed tariffs as either shippers or ultimate consumers of aviation fuel shipped on the Buckeye system to the New York Airports. The Protesters request that Buckeye's filing be rejected or suspended for the maximum statutory period subject to refund and hearing procedures.

6. The Protesters assert that they will be unable to participate in the new volume incentive program because of its distinction between consumers and marketers. The Protesters argue that the distinction between consumers and marketers results in undue discrimination under the Interstate Commerce Act. They contend that the incentive program allows consumers to act as marketers by allowing them to nominate and transport aviation fuel on behalf of others giving an unfair advantage to those airlines that are in an alliance or joint venture with a consumer.

7. The Protesters argue that the volume incentive consumers' ability to ship for other airlines amounts to undue discrimination against certain small airlines. The Protesters argue that those airlines (such as Protestors Alaska and Virgin America) are unable to take advantage of the volume incentive program due to their small size while other small airlines who on their own would not qualify for the incentive program will still benefit from the program due to their partnerships with others. They argue that this is unduly discriminatory. Finally, the Protesters posit that the volume incentive program will result in a degradation of service during times when Buckeye is under capacity constraints. They claim that volume shippers will have a higher share of pipeline capacity because of

⁴ The airports are Newark International Airport, John F. Kennedy International Airport and LaGuardia Airport.

the volume incentive program and therefore the Protesters will receive a lower percentage allocation in case of capacity constraints.

Answers

8. On October 21, 2015, a response to the protest was filed by Buckeye and a joint response to the protest was filed by American Airlines, Inc., Delta Air Lines, Inc., JetBlue Airways Corporation, United Airlines, Inc. and U.S. Airways, Inc. (Airlines). The respondents assert that the protest should be rejected and the tariff should be accepted and permitted to go into effect. Since the responses by Buckeye and the Airlines (hereinafter Respondents) are similar, the substance of their arguments will be consolidated below.

9. The Respondents assert that the protest collaterally attacks an approved settlement by raising untimely claims. They assert that the underlying litigation has been active for more than three years. Respondents assert that the Protesters knew about the litigation and ongoing settlement discussions as demonstrated by the fact that World Fuel Services, Inc. affirmatively assigned any claims to reparations or refunds associated with volumes it shipped on behalf of JetBlue and U.S. Airways for the relevant time period. Respondents contend that that under the Commission's Rules of Practice and Procedure "[a]ny failure to file a comment constitutes a waiver of all objections to the offer of settlement."⁵ The Respondents assert that the Commission has ruled that "the only issue appropriate for Commission review with regard to a compliance filing is whether the filing complies with the Commission order directing the filing."⁶ Respondents submit that Buckeye is simply filing to comply with the settlement approved by the Commission's September 29, 2015 order. The Respondents assert that any attempt to upset the settlement would erase numerous benefits to the pipeline, shippers (including the Protesters), jet fuel consumers, and airports. The Respondents state these benefits include a reduction in the generally applicable base rates and a volume incentive program that is applicable to all shippers, both which remain stable for the three-year term of the settlement. Importantly, the Respondents assert that implementing the settlement will allow for critical infrastructure upgrades to the facilities serving the New York City area airports.

10. In addition to arguing that the protest is procedurally defective, the Respondents assert that the substance of the Protesters' arguments is also without merit. The Respondents contend that contrary to the Protesters' claims, Buckeye's volume incentive program is not unduly discriminatory or unduly preferential. Respondents assert that the

⁵ 18 C.F.R. § 385.602(f)(3) (2015).

⁶ See, *Texas Eastern Transmission Corp.*, 69 FERC ¶ 61,309 at p. 62,183 (1994).

volume incentive program rates are offered to jet fuel consumers and not marketers based on a reasoned distinction between these two classes of shippers. Respondents contend that the volume incentive recognizes the reality of how the jet fuel supply structure actually works on Buckeye's system and does not disadvantage either existing business relationships or negatively affect marketers like World Fuel Services, Inc. The Respondents contend that incentive rate programs similar to the one at issue here have been approved by the Commission so long as the pipeline, as Buckeye has done here, makes the incentive rate program "available to any shipper willing and able to meet the contract's terms."⁷

11. The Respondents argue that the distinction between jet fuel consumers and jet fuel marketers recognizes the competitive differences between these classes and the incentive rate program reflects the fact that consumers and marketers are not similarly situated. Respondents assert that jet fuel consumers, i.e., the airlines, decide now and in the future whether to use Buckeye's pipeline system to transport jet fuel to the New York Airports or to pursue and develop alternatives to Buckeye's pipeline system. The Respondents submit that jet fuel marketers are generally in the business of sourcing, aggregating, and supplying jet fuel for their customers, thereby consolidating transportation service demand into larger blocks of shipment volumes, rather than generating original demand. The Respondents assert that marketers transporting under the Buckeye tariff suffer no disadvantage under the volume incentive program because third-party fuel vendors and marketers are indifferent to the rates on the pipeline inasmuch as those marketers completely pass through all jet fuel transportation charges to jet fuel consumers at the New York Airports.

12. The Respondents assert that the volume incentive program does not discriminate against small consumers. Respondents explain that the volume incentive program allows access to incentive rates to any jet fuel consumer who can meet the volume requirements and offers small consumers the opportunity to access the incentive rates through forming affiliate relationships, commercial alliances, or joint ventures with others. Respondents contend that such arrangements allow for smaller consumers to pool or aggregate shipping requirements for purposes of qualifying for incentive rates. Respondents submit that the Protesters have not explained why they could not enter into a simple contractual partnership or enterprise with each other or another air transportation company (separate and apart from any commercial alliance) for handling their fuel shipping requirements in order to aggregate their volumes to take advantage of the volume incentive rates.

⁷ See, *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1317 (D.C. Cir. 1987); see also, *Sea-Land Service, Inc.*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); *Enbridge (U.S.) Inc.*, 124 FERC ¶ 61,199, at P 21 (2008); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040, at P 23 (2006).

Respondents contend that the Protesters have voluntarily chosen to continue their current relationships and not explore new business opportunities that would allow them to access the volume incentive program. Respondents assert that the Protesters choice to make their own business decisions (such as maintaining existing business arrangements with one another, rather than the consumer Protesters modifying their relationship with the marketer Protester, World Fuel Services, Inc.) does not mean the tariff is discriminatory or unduly preferential. Respondents suggest that if World Fuel Services, Inc. is in a position to hold the consumer Protesters to an agreement so that as a result they cannot use the volume incentive rates, this does not make those rates unduly discriminatory or preferential.

13. The Respondents assert that the fact that airline consumers have the potential to act as marketers is beneficial and does not undermine the general distinction between marketers and consumers. Respondents state that the volume incentive program allows an airline to source jet fuel for another affiliate, commercial alliance partner, or joint venture partner, and to have those volumes count towards the airline's volume commitment obligation. While this provision makes it possible for an airline to act as a marketer under certain limited circumstances, the Respondents contend this possibility does not undermine the program's reasonable distinction between those entities that focus on marketing jet fuel and those entities that consume jet fuel.

14. Finally, with respect to issues of degradation of service, respondents assert that Buckeye's prorationing policy allocates capacity to shippers based on each shipper's shipment history during a 12-month base period. Respondents contend that any airline attempting to expand its marketing function would have to operate within its existing shipper history of the capacity-constrained system that serves JFK and LaGuardia, which are lines upon which marketers hold significant capacity rights through their shipper history positions. Respondents contend that the erosion of a marketer's business as a result of an airline's occasional marketing efforts would be constrained by the realities of Buckeye's prorationing policy.

Discussion

15. Buckeye has made the subject tariff filing to implement a volume incentive rate program as well as new base rates for transportation of aviation fuel to the New York Airports. Buckeye made this filing in accordance with the terms of a settlement approved by the Commission on September 29, 2015. The Protesters request that the filing be rejected or suspended for the maximum period and set for hearing. The Protesters claim the tariff is unduly discriminatory and unduly preferential, disadvantages small jet fuel consumers and marketers, and will result in the degradation of service to certain shippers.

16. The threshold question to be answered is whether the tariff filed by Buckeye complied with the terms of the settlement agreement. The answer to that question is yes. In accordance with the settlement, Buckeye filed a tariff implementing the terms of the

settlement requiring a volume incentive rate program and new base rates for transportation to the New York Airports. Normally, this would be the end of the inquiry with respect to the type of compliance filing made by Buckeye. However, in protesting the tariff filing, the Protesters have essentially challenged the entire basis of an important settlement agreement that was achieved after long negotiation and was open to input from all stakeholders. The Commission therefore finds it important to address both the procedural and substantive issues raised by the protest.

17. The Commission finds that on a procedural basis, the protest constitutes an impermissible collateral act on the settlement. The three proceedings resolved by the settlement have gone on for nearly three years and all involved the rates to the New York Airports. As sophisticated parties the airlines and marketer who are the Protesters were aware or should have been aware of these proceedings affecting their interests. In fact, the Respondents indicated that World Fuel went so far as to assign its claims to two of the airlines who were complainants against Buckeye. These Protesters all had the opportunity to intervene in the various proceedings in order to protect their interests and failed to do so. To entertain the protest now would essentially destroy a settlement that was agreed to by all active parties and will give the benefit of rate certainty for three years as well as address the issue of capacity constraints at the New York Airports through the development of additional infrastructure. As the Respondents point out, the Protesters waived their rights to object to the settlement because they failed to file comments. Thus, the Protesters failed to adequately protect their interests. They cannot now object to implementation of the settlement as Protesters to a filing implementing the settlement.

18. The Commission also finds that even if the protest were not deficient as a procedural matter, the Protesters' substantive arguments are without merit. In comments on the settlement, Commission Trial Staff, while not opposing the settlement, raised concerns that only jet fuel consumers and not jet fuel marketers were eligible for the volume incentive rates. The Presiding Administrative Law Judges (ALJs) determined that there was no undue discrimination by the exclusion of marketers from the volume incentive rate program because jet fuel consumers and jet fuel marketers are not similarly situated.⁸ This follows from the fact that it is the jet fuel consumer that pays the rates, not the marketer. Specifically, jet fuel consumers and marketers are not similarly situated here because jet fuel consumers create the original demand for jet fuel and price affects their decisions whether to use Buckeye or alternatives, while jet fuel marketers are essentially aggregators that are indifferent to the rates since costs are passed through to jet fuel consumers. The Commission finds that there is nothing in the protests that shows

⁸ August 5, 2015 Joint Certification of Uncontested offer of Settlement at PP 62-74.

the volume incentive program somehow changed the differing situation of jet fuel consumers vis-a-vis jet fuel marketers.

19. The Commission also finds that contrary to the Protesters' arguments, the volume incentive program does not unduly discriminate against small jet fuel consumers as opposed to larger jet fuel consumers. As the Respondents recognized, the Commission has previously approved volume incentive rate programs such as that offered here. In this proceeding, all jet fuel consumers have the ability to qualify for the program and small jet fuel consumers are not disadvantaged because they have the ability to qualify for the minimum volume commitments through the use of affiliate relationships, joint ventures, or commercial alliances. The fact that the small airlines that are part of the Protesters may be unable or unwilling to take advantage of the program due to ongoing or future business relationships or contractual commitments does not render the volume incentive program unduly discriminatory.

20. The Commission also finds that the volume incentive rate program will not result in the degradation of service during times of capacity constraints. In fact, the capacity commitments that are part of the volume incentive program will enable the upgrade of certain facilities that Buckeye agreed to undertake in the settlement to increase pipeline capacity to JFK; such upgrades will alleviate capacity constraints especially during peak summer usage. The facilities upgrades will benefit all shippers using the part of Buckeye's system serving the New York Airports and not just those shippers who qualify for the volume incentive rate program. Moreover, Buckeye has not changed its prorationing policy and allocation of capacity during constraints is still determined using a 12-month base period of shipping history. The fact that larger volume shippers will obtain a larger allocation of pipeline capacity during times of capacity constraint is not unduly discriminatory. This is the nature of a *pro rata* allocation method. Moreover, as already stated, there is nothing preventing the Protesters from making the necessary commercial arrangements to qualify for the volume incentive program in order make larger shipments and thus increasing their future shipping history. Finally, even if participation in the volume incentive program is delayed for reasons particular to certain customers, the fact that existing shipper histories are already established, should minimize any diminution in capacity rights until such time and they make arrangements to enter the program if they wish to.

21. Accordingly, for the reasons discussed above, the Protesters' arguments are rejected on both procedural and substantive grounds, and Buckeye's tariff is accepted, to be effective November 1, 2015.

The Commission orders:

Buckeye's FERC Tariff No. 440.6.0 is accepted, effective November 1, 2015.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.